TAN SEW KENG A

v.

TAN HUNG KHIM & ORS

HIGH COURT MALAYA, JOHOR BAHRU B
AZAHAR MOHAMED JC
[CIVIL SUIT NO: 22-689-2001 (4)]
4 JUNE 2006

CIVIL PROCEDURE: *Affidavits - Affidavit in reply - Purpose of - Rules of the High Court 1980, O. 32 r. 2(1), (2) and O. 32 r. 13(1)(a) - Whether application not a proper summons in chambers as it has no affidavit in support - Whether struck off* C

CIVIL PROCEDURE: *Pleadings - Purpose of - Second defendant's reliance on pleadings in support of application - Whether ill founded in law - Whether pleadings considered as evidence - Whether pleadings can replace affidavits* D

By way of summons-in-chambers (encl. 45) and supported by an affidavit (encl. 44) the second defendant sought for, *inter alia*, the following prayers (1) that the solicitors for the plaintiff be disqualified from acting for the plaintiff with respect to the civil suit filed and (2) that the plaintiff be allowed to appoint another advocate and solicitor. Soon after, the plaintiff took out a summons-in-chambers to strike out certain paragraphs in the affidavit of the second defendant in encl. 44 in support of the application in encl. 45. The judicial commissioner allowed the plaintiff's application and struck off the paragraphs. In view of the judicial commissioner's order, there was nothing left for the second defendant to rely upon in as far as his application in encl. 45 was concerned. Thereafter, the second defendant appealed against the order. The appeal has not been heard. Nevertheless, the second defendant asked that a date be given for the hearing of the application in encl. 45. On the appointed day, the second defendant informed the court that he was not relying on any affidavit evidence in support of the application but in its place he would only be relying upon the pleadings. In resisting the application, the plaintiff argued that encl. 45 was not a proper summons-in-chambers as it had no affidavit-in-support. The plaintiff argued that it should not be entertained and further added that it should be struck off with costs. E F G H I

Held (dismissing second defendant's application in encl. 45):

(1) An affidavit is a sworn statement which is filed by a party to be used in any proceedings in chambers as evidence of the matters deposed therein. As required by O. 32 r. 2(1) and (2) and O. 32 r. 13(1)(a) of the Rules of the High Court 1980, both the summons and the affidavit must be filed and served on the other party. The contents of an affidavit are evidence which forms the basis for court to make its decision in accordance with law. The purpose of an affidavit-in-support is to lay down the foundation of the application by way of the statement of facts and law as disclosed in the affidavit. (para 6)

(2) Without any supporting evidence in the form of an affidavit there was no foundation of the second defendant's application in encl. 45. An application such as in encl. 45 could not stand on its own. There was no evidence whatsoever placed before this court for consideration to disqualify the counsel for the plaintiff from having conduct of this matter as sought by the second defendant in his application. This court could not entertain such an application unless it was supported by a proper affidavit-in-support. (para 7)

(3) The second defendant's reliance on the various paragraphs of the pleadings in support of the application in encl. 45 was ill founded in law. Pleadings are mere averments drawn up and filed by each party to an action. Pleadings are statements in writing and stand as they are presented and are to be duly proven by the parties concerned. Pleadings can never be considered as evidence. In an application such as in encl. 45, pleadings could never replace affidavits as they would never amount to evidence. (para 7)

Case(s) referred to

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 CA ***(refd)***

Yeoh Kee Aun v. PI Capital Asset Management Sdn Bhd & Anor [2004] 4 MLJ 508 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 32 rr. 2(1), (2), 13(1)(a)

For the plaintiff - RK Menon; M/s RK Menon & Co
For the 1st defendant - BH Lee; M/s Gulam & Wong

Reported by Suhainah Wahiduddin

JUDGMENT

[1] By way of a summons-in-chambers (encl. 45) dated 1 July 2002, and supported by an affidavit affirmed on 27 June 2002 (encl. 44), the 2nd defendant sought for the following prayers:

1. That Mr. R.K. Menon, an Advocate & Solicitor of the High Court of Malaya and the firm of M/s R.K. Menon & Co. Advocates and Solicitor of Rooms No. 5 & 6, 6th Floor, Foh Chong Building, 80000 Johor Bahru, Solicitors for the Plaintiff, be disqualified from acting for the Plaintiff with respect to the civil suit filea herein;

2. That the Plaintiff be allowed to appoint another advocate and solicitor to act in place of Mr. R.K. Menon and the firm of M/s R.K. Menon & Co;

3. That costs herein be paid by the Plaintiff; and

4. Any other orders or relief that this Honourable Court deems fit and proper.

[2] Soon after that, the plaintiff took out a summons-in-chambers dated 5 August 2002 (encl. 53) to strike out certain paragraphs in the affidavit of the 2nd defendant in encl. 44 in support of the application in encl. 45. On 29 July 2003, the learned judicial commissioner allowed the plaintiff's application in encl. 53 and ordered that paras 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 contained in 2nd defendant's affidavit (encl. 44) be struck off with costs. It is apparent that in view of the order of the learned judicial commissioner there would be nothing left for the 2nd defendant to rely upon in as far as his application in encl. 45 was concerned. Thereafter, the 2nd defendant appealed against the order made on 29 July 2003 to the Court of Appeal. The appeal has not been heard.

[3] It appears that earlier on when encl. 45 was supposed to be heard by the learned judicial commissioner the stand taken by the 2nd defendant at that material time was that the matter should be postponed pending the outcome of that appeal. In this regard, the relevant notes of proceedings read as follows:

21.8.2003

Abdul Hamid Menon bagi pihak plaintif

K.C. Tho bagi pihak seorang daripada defendan pertama dan defendan kedua dan menyebut bagi peguam defendan ketiga.

Kes ditetapkan untuk sebutan Lampiran 45.

Defendan kedua telah memfail rayuan terhadap keputusan Lampiran 53 dan mohon Lampiran 45 ditangguh sehingga keputusan rayuan terhadap Lampiran 53 dan juga mohon penangguhan pengurusan kes sehingga keputusan.

Abdul Hamid Menon – rayuan tidak menghalang pengurusan kes diteruskan.

Mahkamah

Pengurusan kes diteruskan dan peguam plaintif memfailkan dan menyerahkan Ikatan Pliding, Ikatan Dokumen Bersama, Penyataan Fakta-Fakta Yang dipersetujui dan Penyataan Isu-Isu yang hendak diperbicarakan berserta Senarai Saksi-saksi masing-masing pada atau sebelum 4.11.2003 dan pengurusan kes selanjutnya pada tarikh yang sama.

[4] Nevertheless, by a letter dated 15 February 2005 learned counsel for the 2nd defendant asked that a date be given for the hearing of the application in encl. 45.

[5] And so this court gave a hearing date. Now, on the appointed day of the hearing of encl. 45 on 3 May 2005, learned counsel for the 2nd defendant informed the court that he was not relying on any affidavit evidence in support of the application but in its place he would only be relying upon the pleadings. In resisting me application, learned counsel for the plaintiff argued that encl. 45 was not a proper summons-in-chambers, as it had no affidavit-in-support. He argued that it should not be entertained. And he further added that it should be struck off with costs.

[6] In my view there is merit in the arguments of learned counsel for the plaintiff. An affidavit is a sworn statement, which is filed bv a party to be used in any proceedings in chambers as evidence of the matters deposed therein. As required by O. 32 r. 2(1) and (2) and O. 32 r. 13(1)(a) of the Rules of the High Court 1980, both the summons and the affidavit must be filed and served on

the other party. The contents of an affidavit are evidence, which forms the basis for court to make its decision in accordance with law. The purpose of an affidavit-in-support is to lay down the foundation of the application by way of the statement of facts and law as disclosed in the affidavit (see: *Perbadanan Nasional Insurans Sdn. Bhd. v. Pua Lai Ong* [1996] 3 CLJ 321). The importance of affidavit evidence has been explained in *Ng Hee Thoong & Anor. v. Public Bank Bhd.* [1995] 1 CLJ 609 where the Court of Appeal said that in evaluating affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.

[7] Reverting back to the matter at hand, in my view, without any supporting evidence in the form of an affidavit there is no foundation of the 2nd defendant's application in encl. 45. To my mind, an application such as in encl. 45 cannot stand on its own. Without a supporting affidavit it must, to borrow the words of Steve Shim J (as His Lordship then was) in *Yeoh Kee Aun v. PI Capital Asset Management Sdn. Bhd. & Anor* [2004] 4 MLJ 508, "fall like a house of cards thereby leading to its inevitable demise". In my view, there is no evidence whatsoever placed before me for my consideration to disqualify learned counsel for the plaintiff from having conduct of this matter for the plaintiff as sought by the 2nd defendant in his application. This court cannot entertain such an application unless it is supported by a proper affidavit-in-support. In my view, learned counsel for the 2nd defendant's reliance on the various paragraphs of the pleadings in support of the application in encl. 45 is ill-founded in law. Pleadings are mere averments drawn up and filed by each party to an action. Pleadings are statements in writing and stand as they are presented and are to be duly proven by the parties concerned. Pleadings can never be considered as evidence. In an application such as in encl. 45, pleadings can never replace affidavits, as they will never amount to evidence.

[8] In summary therefore, I will dismiss the 2nd defendant's application in encl. 45 with costs for want of supporting affidavit.